(3)

No. 96-1056

Supreme Court, U.S.
FILED
FEB 5 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, *et al.*,

Petitioners,

—v.—

DIANE SAWYER, CAPITAL CITIES/ABC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Of Counsel:

SUSAN BUCKLEY
EDWARD P. KRUGMAN
DAVID G. JANUSZEWSKI
JONATHAN R. DONNELLAN
CAHILL GORDON & REINDEL
(a partnership including
a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record for Respondents Capital Cities/ABC, Inc., ABC News, Inc., American Broadcasting Companies, Inc., Diane Sawyer, Roberta Gordon, Kelly Sutherland and Jeff Cooke

(Counsel continued on inside front cover)

33 pp

FRANK C. VECELLA
JACKSON & WALKER, L.L.P.
901 Main Street
Suite 6000
Dallas, Texas 75202
(214) 953-6000

Of Counsel:

RICHARD A. ROHAN
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000

BARBARA M.G. LYNN
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000

Counsel of Record for Respondents The Trinity Foundation, Inc., Ole Anthony, Harry Guetzlaff and Powell Holloway

QUESTIONS PRESENTED

1. Whether this Court should reject the teaching of *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO* v. *Scott*, 463 U.S. 825 (1983), that private conspiracies to infringe First Amendment rights are not actionable under 42 U.S.C. § 1985(3), to expand the reach of § 1985(3) to private conspiracies, motivated by religious animus, to infringe First Amendment rights.

2. Whether the court of appeals erred in its application of the law to the facts alleged by petitioners when it held that petitioners failed to allege a "pattern" within the meaning of the Racketeer Influenced and Corrupt Organizations Act as defined by this Court in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989).

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the appeal in the United States Court of Appeals for the Fifth Circuit that is the subject of the petition were:

Plaintiffs-Appellants:

Word of Faith World Outreach Center Church, Inc.
Word of Faith World Outreach Center Church

Defendants-Appellees:

Capital Cities/ABC, Inc.
ABC News, Inc.
American Broadcasting Companies, Inc.
Diane Sawyer
Roberta Gordon
Kelly Sutherland
Jeff Cooke
The Trinity Foundation, Inc.
Ole Anthony
Harry Guetzlaff
Powell Holloway

Pursuant to Rule 29.6, the corporate respondents state as follows:

On September 19, 1996, Capital Cities/ABC, Inc. was renamed ABC, Inc. ABC, Inc. is a wholly-owned subsidiary of Disney Enterprises, Inc., which is itself a wholly-owned subsidiary of The Walt Disney Company, a publicly held corporation. ABC, Inc. has no nonwholly-owned subsidiaries except the following (all of which are nonwholly-owned indirect subsidiaries of ABC, Inc.): DSC Videos, Inc.; ESPN, Inc.; New York Farm Show, Inc.; Worldwide Television News Corporation; ABC/EA Home Software, Inc.; and ABC Radio Partners International Limited.

ABC News, Inc. is a wholly-owned subsidiary of ABC News Holding Company Inc., which is itself a wholly-owned

subsidiary of ABC Holding Company Inc., which is itself a wholly-owned subsidiary of ABC, Inc. ABC News, Inc. has no nonwholly-owned subsidiaries.

American Broadcasting Companies, Inc. is a wholly-owned subsidiary of ABC Holding Company Inc. which is itself a wholly-owned subsidiary of ABC, Inc. American Broadcasting Companies Inc. has no nonwholly-owned subsidiaries.

The Trinity Foundation, Inc. has no parent companies and no subsidiaries.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vi

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

Statement of Facts 2

Tilton's Other Litigations 3

This Litigation 4

SUMMARY OF ARGUMENT 6

REASONS FOR DENYING THE WRIT 8

I. THE DISMISSAL OF PETITIONERS' SECTION 1985(3) CLAIM WAS CONSISTENT WITH AND REQUIRED BY THIS COURT'S DECISIONS AND PRESENTS NO QUESTION WORTHY OF THE EXERCISE OF THIS COURT'S JURISDICTION..... 8

II. THE COURT OF APPEALS' AFFIRMANCE OF THE DISMISSAL OF PETITIONERS' RICO CLAIM PRESENTS NO QUESTION WORTHY OF THIS COURT'S REVIEW 14

PAGE

A. The Courts Below Properly Applied This Court's Decision in *H.J. Inc.* 14

B. No Split in the Circuits is Created by the Fact that Other Courts Have Found Different Facts to Constitute RICO "Patterns" 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases PAGE

Action v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971) 12, 13

Aerojet-General Corp. v. *Askew*, 511 F.2d 710 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975) 6n

Blank v. *Heineman*, 771 F. Supp. 1013 (D. Neb. 1991) 13

Bray v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) 7, 8-14

In re Burzynski, 989 F.2d 733 (5th Cir. 1993) 15

Buschi v. *Kirven*, 775 F.2d 1240 (4th Cir. 1985) 13

Calcasieu Marine National Bank v. *Grant*, 943 F.2d 1453 (5th Cir. 1991) 15

Delta Truck & Tractor, Inc. v. *J.I. Case Co.*, 855 F.2d 241 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989) 15

Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 8, 8n, 9, 10

H.J. Inc. v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) 5, 7, 14-20

Ikuno v. *Yip*, 912 F.2d 306 (9th Cir. 1990) 17n, 18, 19

Jarvis v. *Regan*, 833 F.2d 149 (9th Cir. 1987) 20n

J.D. Marshall Int'l, Inc. v. *Redstart, Inc.*, 935 F.2d 815 (7th Cir. 1991) 18

LeBlanc-Sternberg v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996) 13

PAGE

Lewis v. *Pearson Foundation, Inc.*, 908 F.2d 318 (8th Cir. 1990), *vacated on rehearing*, 917 F.2d 1077 (8th Cir. 1990) (en banc), *cert. denied*, 507 U.S. 908 (1993) 13

Marlowe v. *Fisher Body*, 489 F.2d 1057 (6th Cir. 1973) 13

Medallion Television Enterprises, Inc. v. *SelecTV of California, Inc.*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989) 19n-20n

National Organization for Women, Inc. v. *Scheidler*, 510 U.S. 249 (1994) 16n

Olive Can Co. v. *Martin*, 906 F.2d 1147 (7th Cir. 1990) 18

R.A.G.S. Couture, Inc. v. *Hyatt*, 774 F.2d 1350 (5th Cir. 1985) 15n

Schreiber Distributing Co. v. *Serv-Well Furniture Co.*, 806 F.2d 1393 (9th Cir. 1986) 20n

Sever v. *Alaska Pulp Corp.*, 978 F.2d 1529 (9th Cir. 1992) 19, 19n

Shields Enterprises, Inc. v. *First Chicago Corp.*, 975 F.2d 1290 (7th Cir. 1992) 17n, 18

Southwest Airlines Co. v. *Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977) 6n

Sutherland v. *O'Malley*, 882 F.2d 1196 (7th Cir. 1990) 18

Taylor v. *Gilmartin*, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147, 463 U.S. 1229 (1983) 11, 12n

PAGE

Ticor Title Insurance Co. v. *Florida*, 937 F.2d 447 (9th Cir. 1991) 17, 17n, 19

Tilton v. *Capital Cities/ABC Inc.*, 827 F. Supp. 674 (N.D. Okla. 1993) 3

Tilton v. *Capital Cities/ABC Inc.*, 905 F. Supp. 1514 (N.D. Okla. 1995), *aff'd*, 95 F.3d 32 (10th Cir. 1996), *petition for certiorari filed*, 65 U.S.L.W. 3401 (U.S. Nov. 25, 1996) (No. 96-817) 3-4, 6n

Tilton v. *Richardson*, 6 F.3d 683 (10th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994) 3, 9n, 11, 11n-12n

Town of West Hartford v. *Operation Rescue*, 991 F.2d 1039 (2d Cir.), *cert. denied*, 510 U.S. 865 (1993). 13

United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO v. *Scott*, 463 U.S. 825 (1983) 7, 8-14

United States v. *Busacca*, 936 F.2d 232 (6th Cir.), *cert. denied*, 502 U.S. 985 (1991) 17, 17n

United States v. *Turkette*, 452 U.S. 576 (1981) 16n

United States Textiles, Inc. v. *Anheuser-Busch Cos.*, 911 F.2d 1261 (7th Cir. 1990) 18

Vild v. *Visconsi*, 956 F.2d 560 (6th Cir.), *cert. denied*, 506 U.S. 832 (1992) 19

Ward v. *Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) 13

Constitutional Provisions

U.S. Const. Amend. I 7, 9

PAGE

Statutes

Ku Klux Klan Act of 1871
42 U.S.C. § 1985(2) (1994) 2, 4
42 U.S.C. § 1985(3) (1994) 1-2, 3, 4, 5, 6-7, 8-13

Racketeer Influenced and Corrupt Organizations Act
18 U.S.C. § 1961 (1994), *as amended* 1
18 U.S.C. § 1962(c) (1994) 1, 4
18 U.S.C. § 1962(d) (1994) 1, 4
18 U.S.C. § 1964(c) (1994), *as amended* 1

Texas Civil Practice & Remedies Code Ann.
16.002 (West 1986) 4n

Rules

Federal Rules of Civil of Procedure
Rule 12(b)(6) 4, 5n-6n

Rules of the Supreme Court of the United States
Rule 10 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1056

WORD OF FAITH WORLD OUTREACH CENTER CHURCH, *et al.*,

Petitioners,

—v.—

DIANE SAWYER, CAPITAL CITIES/ABC, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 7, 1996 should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

STATUTES INVOLVED

The statutes at issue in the court of appeals were the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 (1994), *as amended*, 1962(c) & (d) (1994), 1964(c) (1994), *as amended* ("RICO"), and the Ku Klux Klan Act of

1871, 42 U.S.C. § 1985(3) (1994). Contrary to petitioners' suggestion (*see* Pet. at 1; Pet. App. at 23a),[1] 42 U.S.C. § 1985(2) (1994) was not at issue in the court of appeals. Petitioners did allege a claim under § 1985(2) in the district court, and that claim was dismissed. Petitioners did not appeal that dismissal to the court of appeals.

STATEMENT OF THE CASE

Statement of Facts

Through the 1980s and into the 1990s, Robert G. Tilton ("Tilton"), as pastor of petitioners Word of Faith,[2] became one of the most popular and successful televangelists in the country. Notwithstanding his prominence and the media scrutiny accorded some other televangelists, Tilton prospered without attracting much attention by the national press and media. In the spring of 1991, however, journalists working for ABC's weekly news program *PrimeTime Live* ("*PrimeTime*") began an investigation into Tilton. In the course of their research, the ABC journalists received the assistance of Dallas minister Ole Anthony, president of The Trinity Foundation, Inc., a religious community and charitable organization.

On November 21, 1991, *PrimeTime* broadcast a report about three televangelists, including Tilton, that was highly critical of Tilton and his fund-raising practices. A week later, *PrimeTime* broadcast a brief update reporting on reactions to the earlier broadcast. On July 9, 1992, the original *PrimeTime* report was rebroadcast, with certain minor changes, together with a follow-up report. No other ABC broadcasts are at issue.

---

[1] References herein to "Pet. at __" are to the Petition for a Writ of Certiorari. References herein to "Pet. App. at __" are to the Appendix thereto.

[2] Petitioners Word of Faith World Outreach Center Church, Inc. and Word of Faith World Outreach Center Church are referred to herein collectively as "Word of Faith."

Tilton's Other Litigations

As a result of the *PrimeTime* broadcasts, Tilton began a legal assault on ABC, its journalists, and the Trinity Foundation.[3]

First, in May 1992, Tilton filed an action in the United States District Court for the Northern District of Oklahoma against the Trinity Foundation and various lawyers representing individuals in numerous suits against Tilton. Tilton sued for libel and for alleged violations of the Ku Klux Klan Act, 42 U.S.C. § 1985(3). His claims were dismissed, and that dismissal was unanimously affirmed by the Tenth Circuit. *Tilton* v. *Richardson*, 6 F.3d 683 (10th Cir. 1993). This Court denied Tilton's petition for a writ of certiorari. 510 U.S. 1093 (1994).

In November 1992, Tilton commenced a libel action against ABC in the United States District Court for the Northern District of Oklahoma. Shortly thereafter, Tilton moved for a preliminary injunction against any rebroadcast of allegedly false and defamatory statements contained in the November 21, 1991 and July 9, 1992 *PrimeTime* broadcasts. After a five-day evidentiary hearing in June 1993, the district court held that Tilton had failed to demonstrate a likelihood of success on the merits and denied the requested relief. *Tilton* v. *Capital Cities/ABC Inc.*, 827 F. Supp. 674 (N.D. Okla. 1993).

On June 19, 1995, the district court issued its ruling granting ABC's motion for summary judgment as to all claims made in the libel case. *Tilton* v. *Capital Cities/ABC, Inc.*, 905 F. Supp. 1514 (N.D. Okla. 1995). The district court carefully reviewed each of the numerous alleged falsehoods in ABC's

---

[3] The respondents here include three of ABC's corporate entities, together with journalists Diane Sawyer, Roberta Gordon, Kelly Sutherland and Jeff Cooke. These respondents are referred to herein collectively as "ABC." The additional respondents are The Trinity Foundation, Inc. and three individuals affiliated with it, Ole Anthony, Powell Holloway and Harry Guetzlaff. These respondents are referred to herein collectively as the "Trinity Foundation."

PrimeTime reports and concluded that no reasonable jury could find that the *PrimeTime* broadcasts were false and/or published with actual malice. That decision was unanimously affirmed by the Tenth Circuit. *Tilton* v. *Capital Cities/ABC, Inc.*, 95 F.3d 32 (10th Cir. 1996), *petition for certiorari filed*, 65 U.S.L.W. 3401 (U.S. Nov. 25, 1996) (No. 96-817).

This Litigation

Having suffered setbacks in his two actions before the Oklahoma federal courts, Tilton turned to the federal courts of Texas. On November 17, 1993, he instituted this action in the name of the church he controls and directs, Word of Faith, challenging the very same *PrimeTime* broadcasts he had challenged in Oklahoma. Having let the statute of limitations expire for any libel claim,[4] however, Word of Faith was forced to dress up its libel claims in federal statutory clothing.

Word of Faith's initial complaint asserted claims under the Ku Klux Klan Act, 42 U.S.C. §§ 1985(2) and 1985(3), based on the investigation and broadcast of ABC's *PrimeTime* reports. All defendants thereafter filed timely motions to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief could be granted. In an Order dated March 16, 1994, the district court granted defendants' motions and dismissed the complaint in its entirety.

After twice more amending its complaint, on August 2, 1994, Word of Faith filed its third amended complaint, asserting new claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1962(c) & (d) ("RICO"). ABC moved to dismiss the third amended complaint for failure to state a claim upon which relief could be granted. The Trinity Foundation filed a similar motion, moving in the alternative for summary judgment on the grounds of *res judicata* based on the final disposition of the Oklahoma federal court

---

[4] The Texas statute of limitations for defamation claims is one year. Tex. Civ. Prac. & Rem. Code Ann. § 16.002 (West 1986).

action brought against it by Tilton. By Order dated February 8, 1995, the district court granted respondents' motions to dismiss the third amended complaint. (Pet. App. at 17a-22a) The district court entered a final judgment dismissing the action with prejudice. (Pet. App. at 16a)

Word of Faith appealed to the United States Court of Appeals for the Fifth Circuit. On August 7, 1996, the Fifth Circuit unanimously affirmed the judgment of the district court. *Word of Faith World Outreach Center Church, Inc.* v. *Sawyer*, 90 F.3d 118 (5th Cir. 1996). With respect to Word of Faith's claims under RICO, the Fifth Circuit, applying this Court's decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), held:

> the alleged predicate acts occurred during the production and airing of PrimeTime broadcasts concerning Tilton and his Church. The alleged acts were all part of a single, lawful endeavor—namely the production of television news reports concerning a particular subject. We agree with the district court that the Church has failed to plead a "continuity of racketeering activity, or its threat."

90 F.3d at 123, Pet. App. at 12a-13a (quoting *H.J. Inc.*, 492 U.S. at 241). The Fifth Circuit also affirmed dismissal of Word of Faith's claims under § 1985(3) of the Ku Klux Klan Act on the ground that Word of Faith failed to allege that defendants were motivated by racial animus. The court of appeals concluded: "We decline the Church's invitation to extend the reach of section 1985(3) to include conspiracies motivated by religious, as opposed to racial, animus." 90 F.3d at 124, Pet. App. at 14a.[5]

---

[5] Because the district court assessed Word of Faith's complaints on defendants' Rule 12(b)(6) motions, the courts below were required to—and did (Pet. App. at 9a, 19a)—assume that Word of Faith's allegations were true. For example, a central feature of Word of Faith's complaints is the allegation that defendants stole prayer requests and planted them in the trash. Such allegations—and virtually all others—have been shown to be false in Tilton's libel suit against ABC. After extensive dis-

SUMMARY OF ARGUMENT

In the wake of the ABC *PrimeTime* reports that were critical of him, televangelist Robert Tilton has litigated and lost libel and civil rights claims against ABC and the Trinity Foundation. In this action, commenced by the church he controls, Tilton pursues additional claims based on the same ABC broadcasts brought pursuant to the Ku Klux Klan Act and RICO. All of Word of Faith's claims were properly dismissed by the district court, and that dismissal was properly affirmed by the Fifth Circuit.

With respect to Word of Faith's claims under § 1985(3) of the Ku Klux Klan Act, Word of Faith now asks this Court to hold for the first time that a private conspiracy motivated by

---

covery, the district court in that case granted ABC's motion for summary judgment. With respect to the allegation of stolen prayer requests, the district court found:

> Plaintiff also claims that the reports were false because the prayer requests were stolen and then planted in the trash dumpsters. Discovery, however, has failed to uncover any factual basis for the allegations that Defendants stole and planted the prayer requests in the trash dumpsters or in fact suspected that others stole and planted the prayer requests in the trash dumpsters.

905 F. Supp. at 1530-31. Accordingly, even if Word of Faith's complaints in this case had survived defendants' Rule 12(b)(6) motions, they would have been subject to dismissal on summary judgment motions.

Additionally, because Word of Faith and Tilton are in privity, Word of Faith's action would have been subject to dismissal under the doctrines of *res judicata* and collateral estoppel in light of the dismissal of Tilton's other actions against ABC and against the Trinity Foundation. *See Southwest Airlines Co.* v. *Texas International Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir.), *cert. denied*, 434 U.S. 832 (1977); *Aerojet-General Corp.* v. *Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). Because Word of Faith's complaints failed to state a claim, and because the district court ruled before the Oklahoma federal court had dismissed Tilton's suit against ABC, the *res judicata* and collateral estoppel issues were not addressed by the court of appeals below. (90 F.3d at 124; Pet. App. at 15a)

religious animus is actionable under § 1985(3). In so doing, Word of Faith mischaracterizes to the point of misrepresentation this Court's prior decisions in *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO* v. *Scott*, 463 U.S. 825 (1983). In those decisions, this Court not only declined to extend the reach of § 1985(3) beyond conspiracies motivated by racial animus, but it also established that private conspiracies to infringe First Amendment rights are not actionable under § 1985(3). Word of Faith's attempt to circumvent this Court's decisions in *Bray* and *Carpenters* should be rejected.

With respect to Word of Faith's claims under RICO, Word of Faith also mischaracterizes the decision of the Fifth Circuit, claiming that the court created a new test to assess a "pattern" under RICO. In fact, the Fifth Circuit properly applied the test established by this Court in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), to the facts alleged by Word of Faith and found that the allegations were insufficient to satisfy the *H.J.* "pattern" requirement. By citing cases from other circuits in which courts have found the "pattern" requirement satisfied, petitioners argue that there is a split between the circuits. In fact, such decisions merely reflect different outcomes reached under *H.J.* based on different factual allegations. Such differing results do not warrant a grant of a writ of certiorari. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.").

REASONS FOR DENYING THE WRIT

I.

THE DISMISSAL OF PETITIONERS' SECTION 1985(3) CLAIM WAS CONSISTENT WITH AND REQUIRED BY THIS COURT'S DECISIONS AND PRESENTS NO QUESTION WORTHY OF THE EXERCISE OF THIS COURT'S JURISDICTION

Petitioners claim that this Court should grant certiorari to clarify whether § 1985(3) applies to conspiracies motivated by religious animus. (Pet. at 12-17) Urging that this Court's decisions in *Bray* v. *Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), *United Brotherhood of Carpenters & Joiners of America, Local 610, AFL-CIO* v. *Scott*, 463 U.S. 825 (1983), and *Griffin* v. *Breckenridge*, 403 U.S. 88 (1971), established that § 1985(3) does extend beyond the protection of racially-motivated conspiracies, petitioners disingenuously urge that this case presents a unique opportunity to make clear that a private, religious-based conspiracy is actionable under the statute.

For petitioners to maintain that this Court "has held that § 1985(3) is *not* limited to racially motivated conspiracies" (Pet. at 12) and that the Court has never "rejected or retreated" from its view that § 1985(3) encompasses "other-than-race class-based conspiracies" (Pet. at 13) is a blatant misrepresentation of this Court's decisions. This Court has never so held.[6] While the question of whether § 1985(3) *could* be interpreted to extend to private conspiracies motivated by religious animus is one that spawned considerable debate and disagreement following this Court's decision in *Griffin*, to suggest that it was not resolved by the decisions in *Carpenters* and *Bray* so completely ignores the fundamental holdings of those cases as to border on the frivolous.

---

[6] *See Griffin*, 403 U.S. at 102 n.9; *Carpenters*, 463 U.S. at 835-37; *Bray*, 506 U.S. at 269.

As both *Carpenters* and *Bray* held, although § 1985(3) applies to private conspiracies, *see Griffin*, 403 U.S. at 101, it only may do so where the particular right at issue is constitutionally protected against not only government but also private encroachment. *Bray*, 506 U.S. at 267-68, 278; *Carpenters*, 463 U.S. at 833. As the *Bray* Court noted:

> There are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment context, the right of interstate travel).

506 U.S. at 278.

Petitioners' claim here is based on their allegation that defendants conspired to deprive them and their members of their rights guaranteed by the First Amendment to the free exercise of religion. (Pet. App. at 221a ¶ 1)[7] But that right—as fundamental and important as it and the other First Amendment rights assuredly are—is only enforceable against the state. It does not protect against private encroachment. *See Bray*, 506 U.S. at 278; *Carpenters*, 463 U.S. at 833. To suggest, as petitioners do, that this Court's decisions have left open the question of whether private conspiracies to violate First Amendment rights are actionable under § 1985(3) is simply to ignore their very holdings.

Petitioners urge that this Court should grant a writ of certiorari because the decision below is "contrary to the clear legislative history of the [Ku Klux Klan Act]," citing the remarks of Senator Edmunds on the Senate floor in 1871. (Pet. at 13) Petitioners misleadingly suggest that this Court has attributed great significance to Senator Edmunds' remarks

---

[7] Although their complaint made reference to various investigations of Tilton conducted by government agencies, petitioners did not allege that any government agencies or actors were members of the alleged conspiracy to deprive them of their First Amendment rights. (Pet. App. at 220a-253a) Petitioners' allegations concerning government investigations do not alter the application of *Bray* to bar their claims. *See Tilton* v. *Richardson*, 6 F.3d 683, 687 (10th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994).

by making "specific reference" to them in *Griffin*, *Carpenters* and *Bray*. (Pet. at 13) While the holdings of these cases surely govern over the snippets of legislative history cited in them, it is in any event the case that in *Carpenters* the Court considered the very argument made by petitioners here and refused to rely upon Senator Edmunds' remarks at all. After noting that the remarks were made on the Senate floor, this Court explained:

> The provision that is now § 1985(3), however, originated in the House. The narrowing amendment, which changed § 1985(3) to its present form, was proposed, debated, and adopted there, and the Senate made only technical changes to the bill. Senator Edmunds' views, since he managed the bill on the floor of the Senate, are not without weight. But we were aware of his views in *Griffin*, 403 U.S., at 102 n.9, and still withheld judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combatting the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments. Lacking other evidence of congressional intention, we follow the same course here.

463 U.S. at 837.[8]

In a final effort to invoke this Court's certiorari jurisdiction, petitioners predictably invoke the specter of a conflict between the circuit courts of appeals. Petitioners maintain that other circuits "interpret[ ] § 1985(3) to reach conspiracies based on religious bigotry." (Pet. at 13) The conflict cited by petitioners is illusory, however, because decisions of some of the circuits referred to by petitioners do not support their

---

[8] Although petitioners claim the Court made "specific reference" to Senator Edmunds' remarks in *Bray*, petitioners cite only to the concurring and dissenting opinions. (Pet. at 13) Justice Scalia's opinion for the Court made no reference to Senator Edmunds' remarks.

claims at all, and others can no longer be considered definitive in light of this Court's decisions in *Carpenters* and *Bray*.[9]

For example, in support of their contention that the Fifth Circuit's decision conflicts with the law of other circuits, petitioners rely on the Tenth Circuit's decision in *Taylor* v. *Gilmartin*, 686 F.2d 1346 (10th Cir. 1982), *cert. denied*, 459 U.S. 1147, 463 U.S. 1229 (1983). In *Taylor*, decided before this Court's decisions in *Carpenters* and *Bray*, the Tenth Circuit reversed a dismissal of a § 1985(3) claim alleging a conspiracy to violate the plaintiff's "first amendment right to freely practice his religion" that was motivated by "animus against religious minorities." 686 F.2d at 1358. In *Tilton* v. *Richardson*, 6 F.3d 683 (10th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994), however, (which petitioners relegate to a footnote (Pet. at 15 n.36)) the Tenth Circuit reexamined *Taylor* in the light of this Court's intervening decisions in *Carpenters* and *Bray* and affirmed dismissal of Tilton's § 1985(3) claim based on allegations of religious animus. The Tenth Circuit explained:

> *Taylor* was decided in 1982, nearly one year prior to *Carpenters*, and well before *Bray*. *Carpenters* enunciates the principle that § 1985(3) does not apply to private conspiracies unless they interfere with rights that are protected against private, as well as official, encroachment. The issue of whether § 1985(3) covers private conspiracies aimed at rights that are by definition only applicable to public encroachment was not decided in *Taylor*, and to the extent that it might have been, . . . *Carpenters* and *Bray* have effected a change in this evolving area of the law.

6 F.3d at 687.[10]

---

[9] Although petitioners include the Court of Appeals for the District of Columbia in their discussion of the purported split in the circuits, petitioners cite no decision from that court, only a decision of a district court. (Pet. at 14-15)

[10] Tilton, represented by the same counsel who appears of counsel in this case, petitioned this Court for a writ of certiorari in *Tilton*

The pre-*Bray* (and sometimes pre-*Carpenters*) rulings of other circuits, as well, hardly provide a basis for a grant of the writ. Like the Tenth Circuit, some circuits have begun to reexamine and question their decisions in light of *Carpenters* and *Bray*. *Compare Action* v. *Gannon*, 450 F.2d 1227, 1235 (8th Cir. 1971) (upholding religious animus claim based on finding, contrary to subsequent decisions in *Carpenters* and *Bray*, that "First Amendment rights of freedom of assembly and worship" are protected against not only public but private

---

v. *Richardson*. The questions presented by the petition in that case were:

1. Whether a conspiracy to deprive a pastor of his fundamental, natural right to exercise his religion freely is actionable under 42 U.S.C. § 1985(3) (1981).

2. Whether a conspiracy between private individuals to deprive a person of constitutional rights which conspiracy involves, affects or is aimed at influencing the activities of the state, is actionable under 42 U.S.C. § 1985(3) (1981).

3. Whether allegations of a conspiracy resulting in actions by the Texas Attorney General, allegations of a conspiracy intended to influence, pressure and induce action by state officials, and allegations of a conspiracy using state courts to further the aims of conspiracy sufficiently allege state involvement to support a claim under 42 U.S.C. § 1985(3) (1981) (Petition for Certiorari filed December 3, 1993 in No. 93-882; *see* 62 U.S.L.W. 3475 (U.S. Jan. 18, 1994) (No. 93-882)).

The Court denied Tilton's petition. 510 U.S. 1093 (1994).

Interestingly, in that petition Tilton asserted that the Tenth Circuit's decision created a conflict between the circuits "as to whether a conspiracy between private individuals to deny freedom of religion is actionable under 42 U.S.C. § 1985(3)." (Petition for a Writ of Certiorari in No. 93-882 at 7) Now, in this petition, petitioners claim that it is the Fifth Circuit's decision that stands alone and is "contrary to . . . every other circuit that has addressed the issue," including the Tenth Circuit. (Pet. at 14) Having previously argued that *Tilton* v. *Richardson* created a conflict by affirming dismissal of a religious animus § 1985(3) claim, petitioners now portray the decision as if it were a nullity, relegating it to a footnote and misrepresenting *Taylor* v. *Gilmartin* to be the law of the Tenth Circuit. (Pet. at 15 & 15 n.36)

action), *with Lewis* v. *Pearson Foundation, Inc.*, 917 F.2d 1077 (8th Cir. 1990) (en banc) (vacating *Lewis* v. *Pearson Foundation, Inc.*, 908 F.2d 318, 327 (8th Cir. 1990) (wherein dissenting judge had written that *Action* "is no longer viable because [its] reasoning was rejected by the Supreme Court in" *Carpenters*)), *cert. denied*, 507 U.S. 908 (1993). *Compare Ward* v. *Connor*, 657 F.2d 45 (4th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *with Buschi* v. *Kirven*, 775 F.2d 1240, 1258 (4th Cir. 1985) ("Measured by the construction given the statute in [*Carpenters*], it is doubtful that the expansive view of the statute reflected in [*Ward* and other cases] could be considered of continued precedential reliability.").

Other circuit court decisions relied upon by petitioners have rested as much on findings of racial animus as religious animus. *See Marlowe* v. *Fisher Body*, 489 F.2d 1057, 1060 (6th Cir. 1973) (noting district court holding that "prejudice against Jews is based upon race as well as religion"); *Action*, 450 F.2d at 1232 ("It seems clear from the facts in this case that the defendants were stimulated to disrupt the church services by racial and economic motives."); *see also Blank* v. *Heineman*, 771 F. Supp. 1013, 1017 (D. Neb. 1991) (dismissing claim of evangelical Christians based on religious animus, distinguishing *Action* as a case involving a racially motivated conspiracy).

Finally, with respect to the Second Circuit, while observing that "the judicial landscape of § 1985(3) was radically altered" by *Bray*, *Town of West Hartford* v. *Operation Rescue*, 991 F.2d 1039, 1045 (2d Cir.), *cert. denied*, 510 U.S. 865 (1993), that court has not yet had occasion to reexamine its religious animus precedents in light of *Bray*. Although *LeBlanc-Sternberg* v. *Fletcher*, 67 F.3d 412 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996), was decided after *Bray*, in that case the Second Circuit addressed a conspiracy claim asserted against a local government and its officials, not a private conspiracy. The Second Circuit has not yet considered the extent to which its precedents are consistent with *Carpenters* and *Bray*.

In sum, this Court's decisions in *Carpenters* and *Bray* make clear that petitioners' complaint cannot state a claim under § 1985(3). To the extent that any of the circuit court decisions cited by petitioners suggest to the contrary, those circuits should be given the opportunity to reassess the continuing validity of their decisions in light of *Carpenters* and *Bray*. As the foregoing demonstrates, each of the circuits that has had the opportunity to do so has clearly understood and applied the holdings of this Court.

II.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISMISSAL OF PETITIONERS' RICO CLAIM PRESENTS NO QUESTION WORTHY OF THIS COURT'S REVIEW

A. The Courts Below Properly Applied This Court's Decision in *H.J. Inc.*

With respect to the dismissal of its claims under RICO, Word of Faith asserts that the decision below in some way contravenes this Court's decision in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989). (Pet. at 18-22) In *H.J.*, this Court addressed the "pattern" requirement of RICO, holding that in order to satisfy the "pattern" element a RICO plaintiff "must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity." 492 U.S. at 239. In dismissing Word of Faith's RICO claim, the courts below properly applied *H.J.*, correctly determining that Word of Faith did not plead a " 'continuity of racketeering activity, or its threat.' " 90 F.3d at 123, Pet. App. at 13a (quoting *H.J.*, 492 U.S. at 241).

Word of Faith claims that in its decision below the Fifth Circuit "resurrect[ed]" the restrictive and inflexible "multiple scheme" standard rejected in *H.J.* as the touchstone for pattern continuity. (Pet. at 19) The Fifth Circuit has never

subscribed to that or any other restrictive RICO pattern requirement,[11] and this case is no exception.

The court of appeals faithfully applied the *H.J.* analysis, citing that ruling no fewer than ten times in its pattern ruling. (90 F.3d at 122-23; Pet. App. at 10a-13a) In its opinion, the concepts of open-ended and closed period continuity set forth in *H.J.* and this Court's articulation of congressional concerns are recounted at length. (*Id.*) Also relied upon were three Fifth Circuit decisions with facts analogous to this case. In each of those cases, the Fifth Circuit had determined that a single, discrete and otherwise lawful commercial transaction was complete and presented an insufficient threat of repetition to establish pattern continuity. Two of those cases, *In re Burzynski*, 989 F.2d 733 (5th Cir. 1993), and *Calcasieu Marine National Bank* v. *Grant*, 943 F.2d 1453, 1463-64 (5th Cir. 1991), feature extensive quotations from *H.J.* in their analyses of pattern continuity and follow its principles closely. The same continuity concept was employed in the third case, *Delta Truck & Tractor, Inc.* v. *J.I. Case Co.*, 855 F.2d 241, 244 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989), which, although predating *H.J.*, is entirely consistent with *H.J.*'s approach.

Applying *H.J.* and its own decisions reflecting *H.J.*'s teaching, the Fifth Circuit concluded that respondents' newsgathering concerning Tilton and his church lacked sufficient continuity to constitute a RICO pattern. The court held that "[t]he alleged acts were all part of a single, lawful endeavor—namely the production of television news reports concerning a particular subject," and did not present a continued threat of illegal activity. (90 F.3d at 123-24; Pet. App. at 13a)

---

[11] As noted by this Court in *H.J.*, the Fifth Circuit had rejected the multiple scheme standard years before *H.J.* and adhered to a liberal pattern pleading requirement of only two predicate acts before that test was held insufficient in *H.J. H.J. Inc.*, 492 U.S. at 235 n.2 (citing *R.A.G.S. Couture, Inc.* v. *Hyatt*, 774 F.2d 1350, 1355 (5th Cir. 1985)); *id.* at 236-37.

Word of Faith takes the Fifth Circuit to task for concluding that the alleged predicate acts constituted a "single, lawful endeavor." Maintaining that *H.J.* in some way prohibits the Fifth Circuit's analysis, Word of Faith recites the word "single" as if this Court's rejection in *H.J.* of an inflexible and overly restrictive "multiple scheme" test merely paved the way for an equally inflexible rule that entitles a plaintiff to maintain a claim so long as any scheme can be alleged. Nothing could be further from the essential lesson of *H.J.*

The central teaching of *H.J.* is that the concept of pattern, and particularly pattern continuity, may not be reduced to any rigid or fixed rule. 492 U.S. at 241. What is required, rather, is a flexible approach to the analysis of an alleged RICO pattern, so that "[w]hether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." *Id.* at 242. The need for flexibility and case-by-case review is paramount:

> The limits of the relationship and continuity concepts that combine to define a RICO pattern, and the precise methods by which relatedness and continuity or its threat may be proved, cannot be fixed in advance with such clarity that it will always be apparent whether in a particular case a "pattern of racketeering activity" exists.

H.J., 492 U.S. at 243.

H.J. does not suggest, much less hold, that every "single"—or even multiple—scheme or transaction will suffice to state a RICO claim. It held that some may and some may not. Moreover, the factors considered by the Fifth Circuit—that the transaction in question was "single", "discrete", and "otherwise lawful"—are, *on their face*, highly relevant to the pattern analysis mandated by *H.J.* Under the ordinary language analysis this Court has repeatedly used in *H.J.* and other RICO cases,[12] it matters a great deal that "single" and "dis-

[12] *E.g.*, *H.J.*, 492 U.S. at 238; *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260-61 (1994); *United States* v. *Turkette*, 452 U.S. 576, 580-81 (1981).

crete" are virtual antonyms of the word "pattern". If, as this Court held in *H.J.*, the central question is whether the alleged acts "amount to or pose a threat of continued *criminal* activity," 492 U.S. at 239 (emphasis added), it likewise matters that the acts in question are "otherwise lawful."

Guided by the broad precepts this Court "beg[a]n to delineate" in *H.J.*, 492 U.S. at 241, the district court and the Fifth Circuit below undertook precisely the kind of case-specific factual evaluation contemplated in *H.J.* in their review of Word of Faith's claim. Petitioners' tortured reading of the ruling below cannot translate that decision into a rejection of this Court's decision in *H.J.*

B. No Split in the Circuits is Created by the Fact that Other Courts Have Found Different Facts to Constitute RICO "Patterns"

Seeking yet again to demonstrate a split in the circuits, Word of Faith clings to a slender reed of dicta, set forth in a footnote and articulated in the conditional tense, in the Fifth Circuit's opinion. In its footnote, the Fifth Circuit observed that "[t]he law in other circuits *might* have allowed this case to proceed further." (90 F.3d at 123 n.4; Pet. App. at 13a n.4) (emphasis added)[13] That terse observation provides no occasion to revisit this Court's decision in *H.J.*

The Fifth Circuit characterized its own rulings as "consistently different" from cases in the Sixth, Seventh and Ninth Circuits.[14] (90 F.3d at 123 n.4; Pet. App. at 13a n.4) These cases involved forgery (*Ticor*), embezzlement (*Busacca*),

---

[13] Word of Faith mischaracterizes the Fifth Circuit's footnote as an open concession that this action "*would likely have been* allowed to proceed under the law of other circuits." (Pet. at 22 (citation omitted; emphasis added))

[14] *Shields Enterprises, Inc.* v. *First Chicago Corp.*, 975 F.2d 1290 (7th Cir. 1992); *Ticor Title Insurance Co.* v. *Florida*, 937 F.2d 447 (9th Cir. 1991); *United States* v. *Busacca*, 936 F.2d 232 (6th Cir.), *cert. denied*, 502 U.S. 985 (1991); *Ikuno* v. *Yip*, 912 F.2d 306 (9th Cir. 1990).

extortion (*Shields*) and soliciting investments in a fraudulent commodities trading corporation (*Ikuno*). Applying *H.J.* in each case, the courts in those cases determined that the defendants' criminal acts carried an implicit threat of continuity because they were part of defendants' regular way of doing business or accomplishing goals before their enterprises were put to a stop. *Shields*, 975 F.2d at 1295-96; *Ticor*, 937 F.2d at 450-51; *Busacca*, 936 F.2d at 237-38; *Ikuno*, 912 F.2d at 309. In other words, the activities in those cases were neither "single", "discrete", nor "otherwise lawful". Despite the different outcomes, these decisions and those of the Fifth Circuit are in complete harmony in their fidelity to the *H.J.* approach to pattern analysis. The different outcomes are attributable to the dissimilar facts of the cases and a necessary consequence of the careful, case-by-case evaluation required by *H.J.*[15]

Indeed, in *Shields* itself, the Seventh Circuit distinguished its finding of a "pattern" in that case from four earlier cases which "involv[ed] only one scheme directed toward achieving one goal." 975 F.2d at 1295 (citing *J.D. Marshall Int'l, Inc.* v. *Redstart, Inc.*, 935 F.2d 815, 821 (7th Cir. 1991); *United States Textiles, Inc.* v. *Anheuser-Busch Cos., Inc.*, 911 F.2d 1261, 1268-69 (7th Cir. 1990); *Olive Can Co., Inc.* v. *Martin*, 906 F.2d 1147, 1151 (7th Cir. 1990); *Sutherland* v. *O'Malley*, 882 F.2d 1196, 1204-05 (7th Cir. 1990)). In each of those four cases the Seventh Circuit applied this Court's analysis from *H.J.* and, stressing the fact-specific nature of the inquiry, concluded that there existed insufficient pattern continuity to state a RICO claim given the short-lived, focused

---

[15] In the courts below, petitioners cited newspaper reports and other lawsuits of parties unhappy with various ABC news reports over the years to argue that petitioners' allegations constituted ABC's "regular way of doing business." The Fifth Circuit held:

> Pleading the mere existence of lawsuits is not the same as pleading the facts that demonstrate predicate illegal acts as the defendant's regular way of doing business. The Church has not in this respect sufficiently alleged a continuing threat of illegal activity by ABC.

(90 F.3d at 124: Pet. App. at 13a)

nature of the conduct at issue and the lack of evidence that the scheme would be repeated in the future. *Id.* As explained by the court in *U.S. Textiles*:

> In *H.J. Inc.*, the Supreme Court held that a plaintiff or prosecutor need not prove multiple schemes to show a pattern for purposes of the RICO statute. This, however, does not mean that the fact that there is only one scheme involved is of no consequence to the "pattern" determination. To the contrary, "[w]hile a RICO pattern can be established, in some circumstances, by proof of a single scheme, it is not irrelevant, in analyzing the continuity requirement, that there is only one scheme."

911 F.2d at 1269 (citations omitted).

Similarly, proceeding with the fact-specific analysis required by *H.J.*, the Sixth and Ninth Circuits, in decisions subsequent to those relied upon by petitioners, have reached the same conclusion the Fifth Circuit did here when faced with analogous allegations of a single, focused episode of allegedly improper activities with no suggestion of repetition. *Vild* v. *Visconsi*, 956 F.2d 560, 569-70 (6th Cir.) (allegations of marketing agreement scheme amounted "at best to a breach of contract with a single customer"), *cert. denied*, 506 U.S. 832 (1992); *Sever* v. *Alaska Pulp Corp.*, 978 F.2d 1529, 1535-36 (9th Cir. 1992) (retaliatory actions by employer amounted to single episode having a singular purpose). In *Sever*, the Ninth Circuit distinguished its earlier opinions in *Ticor* and *Ikuno* as inapplicable, stating that the conduct alleged in those cases "could not be characterized as a single episode with a single purpose which happened to involve more than one act taken to achieve that purpose." *Sever*, 978 F.2d at 1535 (citation omitted).[16]

---

[16] The *Sever* court cited three earlier Ninth Circuit cases which reached the same conclusion on similar facts. *Id.* at 1535-36, citing *Medallion Television Enterprises, Inc.* v. *SelecTV of California, Inc.*, 833 F.2d 1360, 1364 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989) (no pattern where plaintiff fraudulently induced defendant to enter a tele-

As this Court anticipated in *H.J.*, courts' analyses of allegations of RICO patterns are highly fact specific. That some decisions of the courts of appeals have found allegations sufficient to satisfy the pattern requirement, while others have found other allegations insufficient, does not constitute a split in the circuits. The court below, along with all the other decisions relied upon by petitioners, applied the legal framework established by *H.J.* That different results were reached does not provide a basis for invocation of this Court's certiorari jurisdiction.

Finally, even if this Court were to conclude that, in an appropriate case, it would revisit *H.J.*, this would hardly be the case which lends itself to that reappraisal. The case is, at its core, a subterfuge—a libel case in disguise precisely because (as the Tenth Circuit has already held) there is no merit to the libel claim itself. If this Court were to remand this case to the district court, that court would in all likelihood dismiss the action based on principles of *res judicata* or collateral estoppel. *See supra*, p.5 n.5. Such a case, rooted in claims already determined to be without merit and on the very lip of being dismissed, is hardly worthy of plenary consideration by the Court.

---

vision contract; "Once the [contract was entered into], the fraud, if indeed it was a fraud, was complete."); *Jarvis* v. *Regan*, 833 F.2d 149, 152-53 (9th Cir. 1987) (pattern requirement not satisfied by allegations that legal aid organizations committed three predicate acts of mail and wire fraud in obtaining a single federal grant to defray costs of opposing a ballot initiative); *Schreiber Distributing Co.* v. *Serv-Well Furniture Co.*, 806 F.2d 1393, 1399 (9th Cir. 1986) (pattern requirement not established where defendant had fraudulently obtained a single shipment of goods in violation of plaintiff's exclusive distribution agreement for lack of threat of continuing activity).

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: February 5, 1997

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 701-3000

Counsel of Record for Respondents Capital Cities/ABC, Inc., ABC News, Inc., American Broadcasting Companies, Inc., Diane Sawyer, Roberta Gordon, Kelly Sutherland and Jeff Cooke

Of Counsel:

SUSAN BUCKLEY
EDWARD P. KRUGMAN
DAVID G. JANUSZEWSKI
JONATHAN R. DONNELLAN
CAHILL GORDON & REINDEL
(a partnership including a professional corporation)
80 Pine Street
New York, New York 10005
(212) 701-3000

FRANK C. VECELLA
JACKSON & WALKER, L.L.P.
901 Main Street
Suite 6000
Dallas, Texas 75202
(214) 953-6000

Of Counsel:

RICHARD A. ROHAN
CARRINGTON, COLEMAN, SLOMAN
& BLUMENTHAL, L.L.P.
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000

BARBARA M.G. LYNN
200 Crescent Court
Suite 1500
Dallas, Texas 75201
(214) 855-3000

Counsel of Record for Respondents The Trinity Foundation, Inc., Ole Anthony, Harry Guetzlaff and Powell Holloway